SUPREME COURT, U. S.

AUG 1 1970

E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Term. 1970

No. 481

WILLIAM BUSH,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, WILLIAM BUSH, hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit denying Petitioner's right to have a jury trial in a civil matter despite the pre-trial order issued pursuant to Rule 16 of the Federal Rules of civil procedure and local Rule 16(E) of the United States District Court for the Southern District

of Florida, which provided for trial by jury and for the manner and means of conducting the selection of the jurors. The Court of Appeals in sanctioning the lower court's abuse of Rule 16 has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

In addition, the Court of Appeals has affirmed the lower court's ruling to the effect that the sina qua non for a bad faith action by an insured against its insurer is an offer to settle the law suit for the precise limits of policy insurance.

Under Florida law, however, the limits of insurance are not discoverable by legal process. Florida law is to the effect that the insuror's bad faith need only be predicated upon an opportunity to settle within policy limits. By their ruling the Court of Appeals has decided an important state question in a way in conflict with the applicable state law so as to call for an exercise of this Court's power of supervision. The effect of the Court of Appeals' decision, if allowed to stand, would be that claimants in good faith, seeking to settle their claims, would have to correctly guess the amount of the insured's policy limits before the insurance companies could be liable for acting in bad faith. This situation would be an open door for insurance companies to sit back and gamble with their insured's money until and unless

their adversary might make a correct guess as to the precise limits of insurance. Such is not the law of Florida.

OPINIONS BELOW

The opinion of the District Court is reported at 296 F.Supp. 368 (S.D. Fla. 1969) (Appendix p. 39). The opinion in the U.S. Court of Appeals for the Fifth Circuit both on the original decision and on motion for rehearing is reported on their summary calendar No. 28657. (They are appended hereto as Appendix "A").

JURISDICTION

The order sought to be reviewed was made by the U.S. Court of Appeals for the Fifth Circuit on March 19, 1970. An order denying a timely motion for rehearing was made and entered on May 4, 1970. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Sec. 1245(1).

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER FAILURE OF THE DISTRICT COURT TO ALLOW TRIAL BY JURY WHERE THE UNMODIFIED PRE-TRIAL ORDER SO PROVIDES IS A VIOLATION OF RULE 16 OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND LOCAL RULE 16(E) OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA?

2. WHETHER FAILURE OF THE DISTRICT COURT TO GRANT TRIAL BY JURY IN THE ABSENCE OF STRONG AND COMPELLING REASONS TO THE CONTRARY, AND WHERE ALL PARTIES TO THE ACTION HAVE PROCEEDED AND ACTED

UPON THE ASSUMPTION THAT THE CAUSE WAS TO BE TRIED BY A JURY IS AN ABUSE OF DISCRETION AND VIOLATIVE OF RULE 39(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE?

3. WHETHER THE DISTRICT COURT INCORRECTLY APPLIED THE STATE LAW WHICH PROVIDES THAT AN INSUROR'S BAD FAITH IN NOT SETTLING NEED ONLY BE PREDICATED UPON AN OPPORTUNITY TO SETTLE WITHIN POLICY LIMITS BY HOLDING INSTEAD THAT THE INSUROR'S BAD FAITH IS PREDICATED UPON AN OFFER TO SETTLE WITHIN POLICY LIMITS.

Federal Rules of Civil Procedure Involved.

Rule 16 - Pre-trial Procedure; Formulating Issues.

". . . The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered . . . and such order when entered controls the subsequent course of the action unless modified at the trial to prevent manifest injustice . . . ."

Rule 16(E) of the United States District Court for the Southern District of Florida.

". . . Thereafter the pre-trial stipulation as so modified will control the course of the trial and may be thereafter amended by the court only to prevent manifest injustice." (Appended hereto as Appendix "B")

Rule 39 Trial by jury or by the court.

(B) Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion, upon motion, may order a trial by a jury of any or all issues.

STATEMENT OF THE CASE

This action was brought in the United States District

Court by the defendant, Allstate Insurance Company, by virtue of a Section 1441 removal.

The lawsuit had its inception as the result of a state court action filed by the Petitioner herein against Allstate Insurance Company in the Florida State court. The gravamen of the complaint was that an adverse judgment had theretofore been entered against William Bush in a prior proceeding by one Lummie McCord Grant.

Grant had sued William Bush in the Florida State court for damages as the result of an automobile accident, involving a truck owned, but not driven, by Mr. Bush. Allstate carried the liability insurance on Bush's vehicle to the extent of $10,000.00. Allstate undertook Bush's defense and litigation terminated by a final judgment in favor of plaintiff and against Bush for the sum of $24,000.00 plus costs and interest. This judgment was entered on July 14, 1966, in the Circuit Court of Broward County, Florida, and was subsequently partially satisfied by Allstate in the amount of $10,000.00.

William Bush then sought to recover the excess of the partially satisfied judgment against him and sued Allstate for $14,000.00 plus costs, interest, and attorney's fees (App. 1 - 26). When this action was commenced in the circuit court, Bush's attorney did not ask for a trial by jury, nor did he do so after suit was removed to the United States District Court for the Southern District of Florida on or

about December 12, 1966.

Subsequently, on March 6, 1968, there was a substitution of counsel for plaintiff Bush, which said substitution was recognized by the lower court (App. 28, 29). Thereafter, a pre-trial stipulation was filed and, on July 2, 1968, a pre-trial conference was held, at which time the court directed, and the parties acquiesced, to a trial by jury and the manner and method of such trial (App. 50, 51, 75, 76).

Shortly thereafter, on July 19, 1968, the clerk of the district court set the cause for a civil nonjury trial to be held on September 16, 1968 (App. 36), whereupon plaintiff, on July 25, 1968, moved the court to schedule the cause for a trial by jury (App. 37).

No formal order on said motion was ever entered, though it is admitted that the court orally denied same.

The court, sitting without a jury, then tried the cause on September 19th and October 4th, 1968 (List of Docket Entries). The court issued its memorandum opinion on the 30th day of January, 1969, the tenor of which denied plaintiff's claim for relief (App. 39-43). No separate findings of fact or conclusions of law were made.

Judgment was entered on the 24th day of February, 1969, in favor of Allstate Insurance Company and against the plaintiff, William Bush (App. 33-34).

Thereafter, plaintiff filed his motion for new trial

on March 16, 1969 (App. 44-46), and a separate motion for findings of fact and conclusions of law (App. 46 - 49). The court entertained both of the aforesaid motions and hearing was held thereon on March 24, 1969 (App. 78 - 98).

By order dated April 8, 1969, both motions were denied. Plaintiff then issued a notice of appeal and petitioned both the lower court and the U.S. Court of Appeals for relief to proceed in forma pauperis. Said motions were denied (5th Circ., September 24, 1969, Misc. No. 1436).

Petitioner then appealed to the United States Court of Appeals for the Fifth Circuit raising the federal questions herein with respect to Rule 16, local rule 16(E) and Rule 39(B). In addition, the question involving the applicable state law to be applied to predicate an insuror's bad faith was raised. The Court of appeals on March 19, 1970 handed down its decision affirming the judgment of the lower court on all issues and expressly resolving all questions against the plaintiff. All issues were again raised in a timely petition for rehearing which was denied by an order entered by the Court of Appeals on May 4, 1970.

The testimony at trial has never been transcribed, but every effort will be made to present issues of law to this Honorable Court which appear upon the face of the record.

REASONS FOR GRANTING THE WRIT

POINT I

FAILURE OF THE DISTRICT COURT TO ALLOW TRIAL BY JURY WHERE THE UNMODIFIED PRE-TRIAL ORDER SO PROVIDED IS A VIOLATION OF RULE 16 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULE 16(E) OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

> "It is not an exaggeration to say that pre-trial procedure has been one of the greatest steps taken in recent years in the direction of reducing clogged dockets and shortening trials." Honorable Alexander Holzoff, Preface to the 1966 Federal Rules of Civil Procedure, page 15.

The procedure followed by the district court in the instant case of denying trial by jury pursuant to the unmodified pre-trial order, if allowed to stand, will greatly weaken and water down the full force and effect of Rule 16 of the Federal Rules of Civil Procedure which provides that:

> "The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." (Emphasis supplied)

In the instant case, the pre-trial order not only provided for trial by jury, but also for the manner and means of conducting the selection of jurors. The pre-trial transcript reflects the following:

> "THE COURT: Well this is a jury trial, of course, isn't it?

"MR. FELDMAN: Yes, sir, it is.

"THE COURT: Under the Florida statues, that has to be handled by the Court without a jury. (Attorney's fees).

"MR. FELDMAN: That is my understanding.

"THE COURT: My suggestion on that is that after the verdict, then we will arrange for it being done if there are to be fees awarded, depending upon the verdict. We will arrange for that to be done by affidavit unless counsel prefers to present direct testimony. I would suggest affidavit, but we can resolve that in a moment.

"Mr. Adams, do you have any feelings about the affidavit arrangement?

"MR. ADAMS: No, sir, it is fine with me. (App. 50-51)

* * * * *

"I will conduct a preliminary voir dire of the jury. Then I will turn the jury over, in a sense, to counsel to conduct their voir dire. All peremptory challenges available to the jurors in the box will be exercised as to those jurors at the time the jury is tendered. In other words, if the plaintiff excuses a juror and another one comes in, he will continue with his examination until he is ready to tender the jury. The same will be true of the defendant." (App. 75)

General Rule 16(E) of the United States District Court for Southern Florida provides that: "The record of pre-trial conference is part of trial record," and that, "the pre-trial stipulation as so modified will control the course of the trial, and may be thereafter amended by the Court only to prevent injustice."

"E. RECORD OF PRE-TRIAL CONFERENCE IS PART OF TRIAL RECORD.

"Upon the conclusion of the pre-trial conference,

> the Court will enter further orders as may be appropriate. Thereafter the pre-trial stipulation as so modified will control the course of the trial, and may be thereafter amended by the Court only to prevent manifest injustice. The record made upon the pre-trial conference shall be deemed a part of the trial record. Provided, however, any statement made concerning possible compromise settlement of any claim shall not be a part of the trial record, unless consented to by all parties appearing." (Rule 16(F), United States District Court, Southern District of Florida) (Emphasis supplied)

The custom in this district is to make the minutes of the pre-trial conference the pre-trial order. Please note the form used in this district as reflected by pages 76-77 of the Appendix to Brief for Appellant. In support of this procedure Professor Moore states:

> ". . . (2) The judge may dictate the order directly into the record at the conference or shortly thereafter. If, as is sometimes the practice, a record is made of the entire conference, the minutes may be adopted as the pre-trial order." (Moore, Federal Practice, Par. 16.18, p. 1130 (2d ed. 1969))

Thus the cause was to be governed by the pre-trial minutes and these clearly provided for trial by jury. If the cause was to thereafter be tried to the Court, rather than the jury, it was incumbent on the defendant to show unto the Court that manifest injustice would result unless the pre-trial minutes were to be modified.

The Court never modified the pre-trial order; the clerk issued the notice of non-jury trial.

The defendant never moved the Court to modify the pre-trial order.

The Court was never presented with any showing that manifest injustice would ensue if the pre-trial stipulation was adhered to and trial to the jury conducted.

The petitioner's right to a trial by jury pursuant to the pre-trial order should not be denied because he moved the Court to correct the clerk's error by having the cause transferred from the non-jury docket to the jury trial docket and at the same time asking for Rule 39(B) relief.

This Honorable Court in United States v. Houghan, 364 U.S. 310; 81 S.Ct. 13; 5 L.Ed. 2d 8; Reh. Den. 364 U.S. 938; 81 S.Ct. 376; 5 L.Ed. 2d 372 (1960), in determining the effect of a pre-trial order stated that (at 17):

> ". . . The effect of the order is clear from the language of Rule 16 which provides that the court after pre-trial conference, 'shall make an order which recites . . . the amendments allowed to the pleadings . . . and such order when ordered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.'"

See, Sinclair Refining Co. v. Howell, (5 C.A. 1955), 222 F.2d 637; Laird v. Aircarrier Engine Service, Inc., (5 C.A. 1959), 263 F.2d 948.

We submit that the words of Judge Murrah are most germane and must be followed to maintain the integrity and full force and effect of Rule 16:

> ". . . The pre-trial order supercedes the pleadings and becomes the governing pattern of the lawsuit." (Case v. Abrams, (10 C.A. 1965), 362 F.2d 193, 195.

Although squarely presented with Rule 16 error, the Court of Appeals below dealt with petitioner's right to trial by jury as a waiver problem and subsequent Rule 39(B) relief, rather than as a Rule 16 procedural question:

> "We first consider Bush's contention that he should have been afforded a jury trial in the court below. The facts material to this contention are as follows. Bush had not demanded a jury trial in the state court before this case was removed to federal court by Allstate in December 1966. During the next eighteen months, in which discovery was being conducted and Bush's present lawyer was substituted as counsel of record for his original counsel, no demand was made on Bush's behalf for a jury trial in the District Court. Then, on July 2, 1968, a pre-trial conference was held. At this conference the lawyers for both sides and the District Judge labored under the assumption that this case was to be tried to a jury, notwithstanding that neither side had ever demanded a jury trial. Thereafter, on July 19, 1968, the clerk of the District Court set the case for a trial to the court to be held on September 16, 1968. In response to this action, plaintiff's lawyer filed a motion on July 25, 1968, for a trial by jury. This motion read in part:
>
> > '. . . (I)t is acknowledged that request for jury trial was inadvertently omitted in the state court proceedings by former counsel of record for (Bush). Thereafter it has been assumed by the parties that this cause was to be tried to a jury and that plaintiff's new counsel has always been under the inadvertent assumption that this cause was to be tried to a jury.
> >
> > 'The pre-trial stipulation and conference provided that this cause would be tried to a jury . . .
> >
> > 'The first time that plaintiff's counsel was advised that this cause was not to be tried

to a jury was the Honorable Court's notice of trial in this matter, said notice of trial being dated July 19, 1968. . .'

"The District Judge denied the motion. For reasons that follow, we conclude that Bush waived his right to a jury trial and that the District Judge did not abuse his discretion in denying Bush relief from this waiver." (United States Court of Appeals for the Fifth Circuit - Decision dated March 19, 1970) (Emphasis supplied)

As the trial court never modified the pre-trial order, as it was never asked so to do and hence no compelling reasons for so doing presented, it was a clear and gross abuse of discretion not to have followed such order.

POINT II

FAILURE OF THE DISTRICT COURT TO GRANT TRIAL BY JURY IN THE ABSENCE OF STRONG AND COMPELLING REASONS TO THE CONTRARY, AND WHERE ALL PARTIES HAVE PROCEEDED AND ACTED UPON THE ASSUMPTION THAT THE CAUSE WAS TO BE TRIED BY A JURY IS AN ABUSE OF JUDICIAL DISCRETION AND VIOLATIVE OF RULE 39(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

If the petitioner has to rely upon Rule 39(B), rather than Rule 16, of the Federal Rules of Civil Procedure to establish his right to a trial by jury, he should have been granted same pursuant to said rule.

Basically, petitioner is being denied his basic right to jury trial because of his attorneys' inadvertence. Is this inadvertence any more cogent than that of the attorneys for the defendant or than that of the judge himself. All parties were equally inadvertent; all parties equally believed

that the case was one to be tried to the jury. Who would have been harmed if it were so tried? The words of the Fifth Circuit Court of Appeals in a prior decision would seem to have particular significance in the above context. "When the discretion of the court is invoked under Rule 39(B), the court should grant a jury trial in the absence of strong and compelling reasons to the contrary." Swofford v. B. & W. Incorporated, 5 Cir. 1964, 336 F.2d 406, 409.

"The federal policy favoring jury trials is of historic and continuing strength, Simler v. Conner, 372 U.S. 221, 222, 83 S. Ct. 609, 619, 9 L.Ed. 2d 691 (1963).

The court in AMF Tuboscope, Inc. v. Cunningham, (10 C.A. 1965), 352 F.2d 150 held that where both attorneys stipulated to trial by jury and the judge entered an order to that effect, it was an abuse of judicial discretion for the judge to later, on his own motion, deny the trial by jury.

When all parties have proceeded and acted upon the assumption that a cause be one for a jury, it would appear that there are no "strong and compelling" reasons for not granting such mode of trial.

POINT III

THE DISTRICT COURT AND THE COURT OF APPEALS INCORRECTLY APPLIED THE STATE LAW WHICH PROVIDES THAT AN INSUROR'S BAD FAITH IN NOT SETTLING IS PREDICATED UPON AN OPPORTUNITY TO SETTLE WITHIN POLICY LIMITS BY HOLDING INSTEAD THAT THE INSURORS BAD FAITH NEED BE PREDICATED UPON AN OFFER TO SETTLE WITHIN POLICY LIMITS AND, MORE PARTICULARLY, FOR THE PRECISE AMOUNT OF SUCH LIMITS.

The Honorable Court of Appeals has herein stated:

> "When an insured sues to recover such an excess on the ground that the insurer's conduct in failing to effect a settlement within policy limits amounts to bad faith, it must be shown that the insurer had an opportunity to settle the claim against the insured within policy limits. That is, in refusal-to-settle cases, Florida law does not subject the insurer to liability for bad faith or conduct tantamount to bad faith in the absence of an offer by the person claiming against the insured to settle within the limits of the insured's policy. American Fidelity Fire Insurance Co. v. Johnson, 177 So.2d 679, 683 (Fla.Dist.Ct.App. 1963), cert. denied, 183 So.2d 835 (Fla.1966): accord, Seward v. State Farm Mutual Automobile Insurance Co., 5 Cir., 1968, 392 F.2d 723, 727-728. See also Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P. 2d 198 (1958)." (Emphasis supplied)

The Honorable Court of Appeals thus has equated "opportunity to settle within policy limits" with "an offer to settle within the limits of the insured's policy."

We respectfully submit that no Florida case has so held.

The Court's reliance upon Seward and Johnson is unfortunately misplaced. Neither of these two cases held that there had to be an offer to settle within the limits of the policy of insurance. They merely held that there had to be an offer of settlement.

The rationale of requiring an offer as a predicate to liability (Seward and Johnson) is that there be some showing of causation between the conduct complained of as constituting bad faith and the damages suffered.

". . . The only difference between American Fidelity and the instant case is the offer of settlement. Contrary to the appellant's contention, an uncommunicated offer is not the same as no offer. An offer to settle, even if unknown to the insurer, is objective evidence of the connection between the insurer's breach of contract and the amount of the damage.". (Seward v. State Farm Mutual Automobile Insurance Co., 5 Cir. 1968, 392 F. 2d 723, at p. 727) (Emphasis supplied)

We submit that a very real difference is created by making "an offer to settle within the limits of a policy of insurance," the sine qua non of "an opportunity to settle."

The letter offering settlement, at issue herein, is set forth below:

"July 8, 1968

"Harry G. Hinckley, Esq.
Fischer & Hinckley
502 Court House Square Bldg.
Fort Lauderdale, Florida

Re: Lummie Grant vs. Bush & Downey

Dear Mr. Hinckley:

This letter is being written to you today and is being hand-delivered to you by me personally this date for the purposes of settling the above described matter which is set for Trial on July 11, 1966.

Please be advised that we hereby offer to settle this matter in full for $30,000.00. We believe this amount to be reasonable under all the circumstances and especially the fact that your examining physician has found Mrs. Grant totally disabled to date.

However, although it would amount to a financial loss to our client, we would settle this litigation with you for your clients policy limits, which we believe to be $20,000.00. This is a firm offer of settlement for $20,000.00 upon proper proof of the policy limits.

In reference to the actual Trial, please be advised of the following:

The address of Mrs. Stone is 1525 N. W. 5th Avenue, Pompano Beach, Florida.

Also, please be advised that although our Pre-trial Catalog referred to Mrs. Wilson as a witness, we intend to call Mr. Wilson, whose address is 1528 N. W. 5th Avenue, Pompano Beach, Florida.

Sincerely,

/s/ Ronald E. Kay
RONALD E. KAY
Attorney at Law

(Record, p. 107, Docket Entry 9, Deposition of Ronald E. Kay)

In the case at bar would the matter have been concluded if the defendant would have, in response to petitioner's ill-conceived demand letter, disclosed its true policy limits and offered the same in return for a full settlement? Could the insurer close its eyes to counsel's obvious misconception and never be held accountable?

The lower court's comment on rehearing is particularly germane as to the question of causal relationship between the failure to respond and the ultimate damage suffered:

"THE COURT: Well, isn't that true in any case? Isn't it true in most of your personal injury litigation cases, that if the defendant has no assets beyond his policy coverage, that the plaintiff would probably be willing to take the policy limits?

"MR. FELDMAN: Your Honor, I think that is universally recognized fact and that is why

> I say in this particular lawsuit, had the limits been disclosed, there would have been a settlement; certainly, there would be reasonable grounds to believe that there would have been a settlement, because anybody would accept that." (App. 87-88)

In addition, the Court held in Seward (supra) that:

> "The question before us is whether an insurer is liable to one of its insureds for damages in excess of the limits of the insured's automobile liability policy for having wrongfully refused to defend the insured in a suit that resulted in a judgment exceeding the amount of the policy. The insurer argues: No--not unless there is an offer of settlement the insurer might have accepted, or used as the basis for negotiation of a settlement, lower than the amount of the judgment." (Seward v. State Farm Mutual Automobile Insurance Co., supra, at p. 724) (Emphasis supplied)

Petitioner's motions for the lower court to make further findings of fact and conclusions of law point out how very real factual issues have been taken out of this case by the rule of law adopted by the lower court and herein followed by the Honorable Court of Appeals.

> "1. Once an offer to settle is made by a plaintiff, indicating an erroneous policy limit of defendant's insurance, is there a duty on the part of the insurer to inform the plaintiff of the actual limits of insurance and if the likelihood of a verdict in excess of such limit is indicated, to offer the amount of the policy in full satisfaction?
>
> 2. Did the attorney for Grant erroneously believe that the limits of Bush's Allstate policy were $20,000.00?" (App. 46-47)

* * * *

"5. Though Grant indicated a total dissatisfaction with the jury's verdict after trial, was her uncontradicted testimony that 'prior to trial' she had given her attorney permission to settle for the limits of Bush's insurance, but not to give any 'discounts', inherently incredible or impossible?

6. Did Grant's attorney conduct a financial investigation of Bush prior to trial and was he thereby aware that a judgment in excess of policy limits would be uncollectible?

7. Did Grant's attorney advise his client prior to trial to accept the limits of Bush's insurance, whatever they may have been?

8. Had the limits of Bush's policy been communicated to Grant's attorney, would he have recommended that she accept them and if so, would she have followed his advice?" (App. 47-48)

EVEN IF THE SINE QUA NON OF AN "OPPORTUNITY TO SETTLE WITHIN POLICY LIMITS," IS AN OFFER TO SETTLE WITHIN SUCH LIMITS, THE RULING OF THE LOWER COURT WAS ERROREOUS BY PLACING AN EVEN GREATER BURDEN ON THE PLAINTIFF.

Faced with the inept written demand and oral testimony that Grant would have settled her litigation if Allstate would have disclosed Bush's policy limits, the court disposed of the entire matter by applying a rule of law more stringent than it had previously utilized. The lower court's opinion states:

"Bush further argues that Allstate had a duty upon receipt of the above discussed letter to respond by offering or at best disclosing the policy limits. Refusal to disclose policy limits in return for an offer to settle within coverage (upon such disclosure) does not render the insurer liable for an excess judgment. Chicoine v. State Farm Insurance Company, 223 N.E.2d 510 (Mass. Supreme Ct., 1967). (App. 42) (Emphasis supplied)

The court thus disposed of any factual issues dealing with the settlement negotiations by applying a rule of law to the effect that before the question of bad faith can be considered, there must have been an offer to settle for the specific amount of a policy of insurance.

If, under Florida law, limits of insurance were not discoverable (Brooks v. Owens, Fla. 1957; 97 So.2d 693), how much more decisive or definite could an offer to settle for policy limits be?

The incorrect application of the Florida law by the courts below results in the situation of allowing insurance companies to handle a case in bad faith with no fear of liability until the claimant guesses the limits of the insurance policy. Such a rule of law not only is not followed in Florida, but is violative of common sense and principles of justice, calling for an exercise of this Honorable Court's power of supervision.

CONCLUSION

This Court should grant certiorari and the judgment below should be reversed and the cause remanded for trial by jury.

Respectfully submitted,

RICHARD A. SICKING
Attorney for Petitioner
1951 N. W. 17th Avenue
Miami, Florida

RICHARD A. SICKING

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition was mailed to Dean, Adams, George & Wood, Attorneys for Respondent, Concord Building, Miami, Florida 33130, and that all parties required to be served have been served, this 30th day of July, 1970.

RICHARD A. SICKING

Richard A. Sicking

DONALD FELDMAN

Donald Feldman